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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-

JERRY EDWIN HOLCOMBE,

Petitioner,

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

J. D. TODD, JR.
Post Office Box 2248
Greenville, South Carolina 29602

HENRY F. FLOYD
Post Office Box 978
Pickens, South Carolina 29671

Attorneys for the Petitioner

QUESTION PRESENTED

Did the Supreme Court of South Carolina in upholding a charge to the jury by the trial Judge that a man intends the natural and probable consequences of his act violate petitioner's Fourteenth Amendment right to due process under the law in that such instruction shifted the burden of proof of the issue of intent to the defendant, contrary to the holding of this Court in *Sandstrom v. State of Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-

JERRY EDWIN HOLCOMBE, *Petitioner,*	)	**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA**
vs.	)	
THE STATE OF SOUTH CAROLINA, *Respondent.*	)	

Jerry Edwin Holcombe respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina in the above entitled case.

OPINIONS BELOW

The Opinion of the Supreme Court of South Carolina filed February 5, 1981 (Appendix 6) is not reported, it being a Memorandum Opinion issued under Rule 23 of the Rules of the Supreme Court of South Carolina as Opinion No. 81-MO-21. The Order of the Supreme Court of South Carolina denying rehearing (Appendix 7), dated March 24, 1981, is not reported.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on February 5, 1981. The Order of the Supreme Court of South Carolina denying a timely Petition for Rehearing was entered on the 24th day of March, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Did the Supreme Court of South Carolina in upholding a charge to the jury by the trial Judge that a man intends the natural and probable consequences of his act violate petitioner's Fourteenth Amendment right to due process under the law in that such instruction shifted the burden of proof of the issue of intent to the defendant, contrary to the holding of this Court in *Sandstrom v. State of Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment Fourteen, Section 1, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Jerry Edwin Holcombe, was convicted of the murder of Amy Swafford by a jury of the Court of General Sessions of Oconee County, South Carolina, on October 20, 1979, and he was then sentenced to life imprisonment by the Honorable William H. Ballenger, Circuit Judge, after motions for judgment notwithstanding the verdict and new trial were denied.

Thereafter, petitioner filed timely appeal to the Supreme Court of South Carolina, which Court affirmed the judgment of the lower Court in what is known as a Memorandum Opinion merely stating the Court was of the opinion that no error of law was present and that a full written Opinion would be without precedential value.

Thereafter, Petition for Rehearing was filed on the 12th day of February, 1981 and subsequently denied without comment on the 24th day of March, 1981.

Amy Swafford was the four-year-old daughter of Mr. and Mrs. Claude Swafford. Petitioner had engaged in an extra-marital affair with Mrs. Swafford for approximately a year, and after an argument on the telephone with Claude Swafford,

petitioner went to the Swafford home in his pickup truck. Mr. Swafford, Mrs. Swafford and Amy were in the carport, and there was one discharge of a shotgun from petitioner's truck. One pellet hit the child, resulting in her almost instantaneous death. No one else was injured.

Petitioner contended the discharge was an accident while the State contended it was a malicious and intentional discharge.

The Circuit Court charged the jury "that a man intends the natural and probable consequences of his act." Page 277, Lines 8 and 9, Transcript of Record, Supreme Court of South Carolina. Petitioner made timely and proper objection to such charge as being contrary to the decision of this Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, to which the Circuit Judge replied, "If the United States Supreme Court wants to overrule our law, I will let them do it, sir. I will not." Page 286, Lines 22 and 23, Transcript of Record, Supreme Court of South Carolina.

WHY THE WRIT SHOULD BE GRANTED

Petitioner respectfully submits that the Supreme Court of South Carolina has decided a Federal question of substance in a way not in accord with the applicable decisions of this Court. Petitioner asserted at the trial level, at the appellate level in the Supreme Court of South Carolina, and in Petition for Rehearing that rights guaranteed to him by the Constitution of the United States had been violated by the charge of the trial Judge that "Now I charge you that it is an axiom of the law that one intends the probable and natural consequences of his act." (Appendix 8). Objection to such charge was promptly and properly taken by petitioner. (Appendix 9). Such objection was preserved by proper Exception to the Supreme Court of South Carolina. (Appendix 10).

Such a charge was specifically condemned by this Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L. Ed.2d 39. Such a charge has been condemned by numerous Courts, as cited in Footnote 3. The jurors were only told that the law presumed that a person intended the natural and

probable consequences of his act. Certainly, as is said in *Sandstrom*, ". . . there is a 'risk' that the jury, once having found petitioner's act voluntary, would interpret the instruction as automatically directing a finding of intent." The trial Judge did not tell the jury that such presumption could be rebutted at all. As this Court said in *Sandstrom*, "First, a reasonable jury could well have interpreted the presumption as 'conclusive,' that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence — thus effectively shifting the burden of persuasion on the element of intent." Further in *Sandstrom* this Court stated: "However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations." This Court then determined that such an instruction constituted constitutional error.

Despite the fact that this decision, almost on all fours with the instant case, was presented to the Circuit Judge, he ignored the decision of the highest Court in the land, stating, with no effort to distinguish the cases or to explain why the decision was not applicable: "If the United States Supreme Court wants to overrule our law, I will let them do it, sir. I will not."

On appeal the Supreme Court of South Carolina did not attempt to distinguish petitioner's case from *Sandstrom*, nor did it offer petitioner any reason as to why *Sandstrom* did not apply, but merely filed a Memorandum Opinion to the effect that no error of law appeared. This despite the fact that the Supreme Court of South Carolina in *South Carolina v. Woomer*, in Opinion No. 21442 filed April 28, 1981, stated: "No principle of law is more firmly established than the solemn duty of the court to determine the law of the case and declare it to the jury. That jury is bound by, and must accept

and be governed by, the instructions of the court." Such a cavalier treatment of the constitutional rights of petitioner is inexplicable. In view of the way in which this matter has been handled, petitioner does not know whether the Supreme Court of South Carolina approved Judge Ballenger's statement that "If the United States Supreme Court wants to overrule our law, I will let them do it, sir. I will not." or whether the Supreme Court of South Carolina considered the charge harmless error. In connection with that, we respectfully submit that an unconstitutional jury instruction could hardly constitute harmless error, but certainly, if that is what the Supreme Court of South Carolina meant to say, it should have said so and informed petitioner of such. Constitutional issues properly presented to the Court must be disposed of so that citizens may know that their constitutional rights have been considered and why they are not accorded the protection required by this Court. Although it is impossible to determine the reasons for the affirmance of the judgment of the Court of General Sessions by the Supreme Court of South Carolina, it is respectfully submitted that such Court has either ignored a Federal question of substance which was properly before it or decided a Federal question of substance in a way not in accord with the applicable decisions of this Court, namely, *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Writ should issue to the Supreme Court of South Carolina.

Respectfully submitted,

J. D. TODD, JR.
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Greenville, S.C. 29602

HENRY F. FLOYD
Post Office Box 978
Pickens, S.C. 29671

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State ..... *Respondent,*

v.

Jerry Edwin Holcombe ..... *Appellant.*

Appeal From Oconee County
William H. Ballenger, *Judge*

Memorandum Opinion No. 81-MO-21
Filed February 5, 1981

AFFIRMED

Henry F. Floyd, of Acker, Acker, Floyd & Welmaker, of Pickens, for appellant.

Attorney General Daniel R. McLeod and Assistant Attorneys General Kay G. Crowe and Lindy Pike Funkhouser, all of Columbia; and Solicitor L. Henry Raines, II, of Anderson, for respondent.

PER CURIAM: Appellant was convicted of murder and sentenced to life imprisonment.

After a careful consideration of the record and briefs, we are of the opinion that no error of law is present, and that a full written opinion would be without precedential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

s/ J. Woodrow Lewis	C.J.
s/ Bruce Littlejohn	A.J.
s/ J. B. Ness	A.J.
s/ George T. Gregory, Jr.	A.J.
s/ David W. Harwell	A.J.

The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

March 24, 1981

Henry F. Floyd, Esquire
Messrs. Acker, Acker, Floyd & Welmaker
P. O. Box 978
Pickens, South Carolina 29671

Re: The State v. Jerry Edwin Holcombe

Dear Mr. Floyd:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition Denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J."

The remittitur is being sent down today.

Very truly yours,

Frances H. Smith
CLERK

FHS/rl

cc: The Honorable Lindy P. Funkhouser

CHARGE OF THE TRIAL JUDGE

(Page 277, Lines 8 and 9, Transcript of Record, Supreme Court of South Carolina)

Now I charge you that it is an axiom of the law that one intends the probable and natural consequences of his act.

OBJECTION TO CHARGE OF TRIAL JUDGE
(Page 286, Lines 16-23, Transcript of Record, Supreme Court of South Carolina)

FLOYD:

We take exception to the charge with respect that a person — that he intends the natural and probable consequences of his act. The exception based upon the case of Sandstrom versus Montana - - -

COURT:

If the United States Supreme Court wants to overrule our law, I will let them do it, sir. I will not.

EXCEPTION 9 TO THE SUPREME COURT OF SOUTH CAROLINA

(Page 313 of the Transcript of Record)

9. The trial court erred in charging the jury that a man intends the natural and probable consequences of his acts in that such charge shifted the burden of proof to Appellant in contravention of the constitutions of the United States and of the State of South Carolina.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

JERRY EDWIN HOLCOMBE,
PETITIONER,

versus

STATE OF SOUTH CAROLINA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

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OCTOBER TERM, 1980

No.

JERRY EDWIN HOLCOMBE,
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versus

STATE OF SOUTH CAROLINA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of South Carolina and order denying rehearing, affirming the judgment of the lower court, are shown in Appendices 6 and 7 of the Petition for Writ of Certiorari.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the instructions of the court below relieve the State of its burden of proving beyond a reasonable doubt the element of malice to the crime of murder?

STATEMENT OF THE CASE

On June 29, 1979, Mr. Claude Swafford picked up his four year old daughter, Amy, from his mother-in-law's house in Oconee County, South Carolina, after getting off work at 6:00 p.m. Mr. Swafford's wife, who usually gets off work at 4:30 p.m., arrived at home at about 9:30 p.m., while he was preparing supper for their daughter. Although Mrs. Swafford indicated to her husband that her grocery shopping had caused her late arrival, she had actually been at the home of her paramour, Mr. Jerry Edwin Holcombe, the Petitioner in this case. Mrs. Swafford and Mr. Holcombe had carried on an affair for approximately one year, and they had intentions of getting married in the future but Mr. Swafford would not consent to the divorce.

Mr. Holcombe, sometime shortly after 9:30 p.m., telephoned this Swafford residence to talk to Mrs. Swafford, thinking that Mr. Swafford had already left for work. However, Mr. Swafford was at home and he picked up the conversation between Mrs. Swafford and Mr. Holcombe on the extension phone. In the ensuing conversation, Mr. Swafford told Petitioner to leave his wife alone, and Mr. Holcombe replied with threats against Mr. Swafford's life. Mr. and Mrs. Swafford argued for approximately ten or fifteen minutes after the telephone conversation concerning Mrs. Swafford's plans to take their daughter, Amy, to Florida on vacation. At this point, the Swaffords and Amy walked out onto their lighted garage and carport.

While standing in the carport, Mr. Swafford noticed a vehicle pulling into his next door neighbor's yard, and then

heard the "click of a shotgun being loaded . . . ." Immediately thereafter, Mr. Holcombe shouted from the vehicle, "here, take this" and fired the shotgun into the garage and carport where Mr. Swafford was standing. Mr. Swafford ran into his house to get his gun, and when he came out he saw Jerry Holcombe's four-wheel drive Ford pickup truck proceeding down the road at a rapid rate of speed.

Immediately after the shot was fired, Amy Swafford cried out and ran into her mother's arms. She died within a matter of seconds from a buckshot pellet which penetrated the center of her chest through the breastbone.

Petitioner's version of this sordid tale was presented mainly through his confession and his testimony at trial. He was arrested at his residence at 11:16 p.m. on June 29, 1979, and taken to the Oconee County Law Enforcement Center in Walhalla, South Carolina. At 4:55 a.m. on June 30, 1979, police officers served a duly executed arrest warrant for murder upon Petitioner, and he agreed to give a statement at that time. This statement and his testimony at trial were very similar. Petitioner indicated that he went to the Swafford home on the night of June 29, 1979, in response to certain verbal threats made by Mr. Swafford during their brief conversation on the telephone. Mr. Holcombe stated that his shotgun accidentally fired while he was sitting in his vehicle with his gun pointed at the ground outside of his window. Mr. Holcombe indicated in his testimony that he did not know the shotgun was loaded at the time of the shooting, but that he later remembered loading the shotgun with the .00 buckshot shell to go rabbit hunting a few days earlier. He further testified that when he subsequently got home he took the shotgun "down to my brother-in-law's for him to clean it." The State introduced evidence, at trial, of a spontaneous declaration made by Petitioner to a correctional officer, stating that he "didn't mean to shoot the little girl but [he] did the man."

At trial, the lower court charged the jury concerning the common law definition of murder, i.e., the killing of another

human being with malice aforethought. He also instructed the jury concerning the doctrine of transferred intent to show that a person need not kill his intended victim in order to be criminally liable for common law murder. Furthermore, the lower court charged the jury that the State had the burden of proving that the killing of Amy Swafford was not accidental. After some deliberation, the jury returned to the courtroom and requested to be charged on the definition of malice. In this charge the lower court made it explicitly clear that the burden of proving malice was at all times upon the State and that any presumption of malice was rebuttable under all the evidence presented in the case.

Petitioner was convicted in the trial court and the conviction was affirmed by the South Carolina Supreme Court on February 5, 1981.

ARGUMENT

I.

The charge of the lower court, considered in its entirety, clearly apprised the jury of the State's burden of proving beyond a reasonable doubt the element of malice to the crime of murder. (Petitioner's Question I.)

Petitioner has attempted to excise a sentence from the instructions given by the lower court and place it out of context in his effort to invoke the principles enunciated by this Court in *Sandstrom v. Montana,* 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979). Actually, the statement that "one intends the probable and natural consequences of his act" was given in connection with the charge on the doctrine of transferred intent, to illustrate to the jury that, in a prosecution for the crime of murder, the State is not required to prove that the victim of the homicide was the person which the defendant intended to kill. South Carolina cases on this subject are *State v. Heyward,* 197 S.C. 371, 15 S.E. 2d 669 (1941); *State v. Williams,* 189 S.C. 19, 199 S.E. 906 (1938); *State v. Kennedy,*

85 S.C. 146, 67 S.E. 152 (1909). Thus, what Petitioner attempts to relegate to a presumption of fact is, in actuality, an explanation of legal principles as they apply to the evidence of the case.

The transcript of the trial makes it quite clear that the jury was not misled as to the essential issue which it was called upon to decide. Appellant's counsel, during closing arguments, summarized the true issue in the case as follows:

> But the question is did Jerry Holcombe unlawfully attempt to kill Claude Swafford with malice aforethought and by mistake kill Amy Swafford? That's the question. (Tr. p. 267, lines 13-15.)

The Solicitor, during closing arguments prior to the lower court's charge, also focused the jury's attention on this issue which the State was required to prove. (Tr. p. 268, line 11-p. 273, line 4.)

Immediately after the arguments of counsel the lower court charged the jury as to the State's burden of proof as follows:

> Murder is the unlawful or felonious killing of any person with malice aforethought either expressed or implied. Hence, in order to convict on murder, the State must not only prove the killing of the deceased by the defendant but it must be proven to have been done with malice aforethought, and such proof must be beyond a reasonable doubt.
>
> * * *
>
> Malice means the doing of a wrongful act intentionally and without just cause or excuse.
>
> * * *
>
> I charge you that even if the facts proven are sufficient to raise a presumption of malice, such presumption would be a rebuttable one and it is for you the jury to determine from all of the evidence whether or not malice has been proven beyond a reasonable doubt. (Tr. p. 275, lines 3-8; p. 276, lines 4-11.)

Also, in connection with this initial charge concerning the crime of murder, it should be noted that Petitioner was given the benefit of a presumption that the killing was accidental, since the lower court specifically instructed the jury that the State had the burden of proving beyond a reasonable doubt that the killing was not accidental, negligent or reckless. (Tr. p. 281, lines 15-25.) Petitioner cannot possibly claim that the jury could have been confused, especially in view of the trial court's later instructions in response to the jury's question on the subject of malice.

Durings its deliberations the jury came back in to the courtroom with a question for the trial judge. The foreman indicated that "we were'nt sure on the subject of malice." (Tr. p. 289, lines 9-10.) In answering the foreman's question the lower court reaffirmed its instruction that "the State must not only prove the killing of the deceased by the defendant but it must be proven to have been done with malice aforethought, and such proof must be beyond a reasonable doubt." (Tr. p. 289, lines 15-18.) Also, the court indicated that any presumption raised by the evidence was rebuttable, and, consequently, not conclusive. (Tr. p. 292, lines 3-9.) This later instruction contains no statement whatsoever that a person intends the probable and natural consequences of his act, thereby absolutely demonstrating that the sentence which Petitioner claims is prejudicial only related to the doctrine of transferred intent, not to the element of malice. Therefore, there can be no question but that this jury understood the quantam of proof necessary for the State to prove in order to convict for the crime of murder.

The standard set forth by this Court in *Mullaney v. Wilbur,* 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), and its progeny, was thoroughly covered before the South Carolina Supreme Court on this issue. Cases which demonstrate the South Carolina Supreme Court's proficiency in dealing with this subject are *State v. Friend, et al.,* Op. No. 21522, ___ S.C. ___, ___ S.E. 2d ___, July 21, 1981; *State v. Mattison,* ___ S.C. ___, 277 S.E. 2d 598 (1981); *State v. Crocker,* 272 S.C. 344,

251 S.E. 2d 764 (1979). We feel that the South Carolina Supreme Court properly applied the standards of *Sandstrom v. Montana, supra,* in concluding that under the facts of this case the State was not relieved of its burden of proving beyond a reasonable doubt all elements of the crime of murder.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitoner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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